

Unraveling Judicial Restraint:  
Guns, Abortion, and the Faux  
Conservatism of J. Harvie Wilkinson III  
*Nelson Lund\* and David B. Kopel\*\**

Writing in the *Virginia Law Review*,<sup>1</sup> a distinguished federal judge maintains that true conservatives are required to substitute principles of judicial restraint for an inquiry into the original meaning of the Constitution. Accordingly, argues J. Harvie Wilkinson III, the Supreme Court's Second Amendment decision in *District of Columbia v. Heller*<sup>2</sup> is an activist decision just like *Roe v. Wade*<sup>3</sup>: “[B]oth cases found judicially enforceable substantive rights only ambiguously rooted in the Constitution’s text.”<sup>4</sup>

The core of Judge Wilkinson’s argument starts with this proposition: “Society is a defined balance between individual and community. When rights are enumerated, courts are empowered to strike the balance; when they are not, *or only ambiguously so*, the balance is set by democracy.”<sup>5</sup> Because Judge Wilkinson believes that the rights recognized in *Heller* and *Roe* are both bereft of *unambiguous* support in the Constitution, he concludes that both decisions were outrageous usurpations of legislative prerogative. He then goes on to elaborate at considerable length the “values” that the *Heller* Court violated by practicing what he calls an “aggressive brand of originalism.”<sup>6</sup>

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<sup>1</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

<sup>2</sup> 128 S. Ct. 2783 (2008).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> Wilkinson, *supra* note 1, at 257. Judge Wilkinson has not always found the Court’s decision in *Roe v. Wade* objectionable. He previously characterized it as a “lifestyle decision,” and asserted that “the constitutional right of procreation can hardly be fundamental if one is compelled to exercise it.” J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 578 (1977). In the course of arguing that “the Court reaffirms its historic function by protecting lifestyle choices,” then-Professor Wilkinson proclaimed: “Although lifestyle freedoms are not expressly safeguarded, we believe that the spirit of the Constitution operates to protect them.” *Id.* at 565, 611.

<sup>5</sup> Wilkinson, *supra* note 1, at 259 (emphasis added).

<sup>6</sup> *Id.* at 256.

In this response, we challenge his critique. Like many others, Judge Wilkinson deploys the “activism” epithet to attack results he dislikes.<sup>7</sup> But in rejecting what he calls “originalism,” Judge Wilkinson is in fact rejecting the Constitution. He replaces the Constitution with judicial “values,” which he then manipulates in order to reach results that he finds attractive on policy grounds.

Part I of this Essay shows that Judge Wilkinson’s analogy between *Roe* and *Heller* is untenable. The right of the people to keep and bear arms is in the Constitution, and the right to abortion is not. Contrary to Judge Wilkinson’s mistaken claim, the genuine conservative critique of *Roe* is based on the Constitution, not on judicial “values.” Judge Wilkinson, moreover, does not show that *Heller*’s interpretation of the Second Amendment is refuted, or even called into serious question, by Justice Stevens’ dissenting opinion.

Part II shows that Judge Wilkinson himself does not adhere to the “neutral principles” that he claims to derive from “true judicial values.”<sup>8</sup> Under the principle of judicial restraint that Judge Wilkinson articulates, many statutes that he reviles, including the Jim Crow laws of the twentieth century, should have been upheld by the courts. Judge Wilkinson does not accept the consequences of his own supposedly neutral principles, preferring instead to endorse or condemn Supreme Court decisions solely on the basis of his policy preferences. That is not judicial restraint. It is judicial lawlessness.

### I. *ROE* AND *HELLER*

The U.S. Constitution is a written document. That document says: “A well regulated Militia, being necessary to the security of a free State, the

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<sup>7</sup> See, e.g., *id.* at 256, 264-65, 265, 274. Cf. Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1701 (2006) (“[I]n many ways, the concept of judicial activism has become more of an epithet than a thought. It often means nothing more than reference to ‘an action taken by a court of which the speaker disapproves’”) (quoting Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276 (2002)); Arthur D. Hellman, *Judicial Activism: The Good, the Bad and the Ugly*, 21 MISS. C. L. REV. 253, 253 (2002) (“No matter how judges are selected, sooner or later some unfortunate candidate will be labeled a ‘judicial activist.’ One has to wonder: Does the term have any identifiable core meaning? Or is it just an all-purpose term of opprobrium, reflecting whatever brand of judicial behavior the speaker regards as particularly pernicious?”).

<sup>8</sup> Wilkinson, *supra* note 1, at 266.

right of the people to keep and bear Arms, shall not be infringed.”<sup>9</sup> The Constitution says nothing at all about a right to abortion, and *Roe v. Wade* made no effort to derive that right from the Constitution. Instead, the Court vaguely relied on “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”<sup>10</sup> This was presumably a reference to the doctrine of substantive due process, which the Supreme Court has never in its entire history tried to derive from the text of the Constitution.<sup>11</sup> Nor was *Roe* dictated by precedent. It was an act of sheer judicial invention, and in that sense an exemplar of what might properly be called judicial activism.

Judge Wilkinson purports to concede that there “is a big difference between when the text says something (whatever that something may be), and when it says absolutely nothing.”<sup>12</sup> In reality, however, he treats the difference as extremely small, and he concludes that *Heller* is only “marginally more justified” than *Roe v. Wade*.<sup>13</sup>

Suppose that the Bill of Rights included a provision stating: “A well regulated medical system that protects women from premature death being necessary in a civilized nation, the right to abortion shall not be infringed.” Then suppose that in the late twentieth century the Supreme Court concluded that medical advances had almost eliminated the dangers of death during pregnancy and labor. Suppose further that three-quarters of the American population believed that the Abortion Clause guaranteed a broad right to abortion, and that evidence of the original public meaning of that clause overwhelmingly showed that it was understood when adopted as protecting a woman’s personal right to choose abortion over giving birth. Suppose that no jurisdiction had banned abortion until long after the Bill of Rights was adopted, and that even today only two cities and a few suburbs did so. Finally, assume that the Supreme Court had recently invalidated a

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<sup>9</sup> U.S. CONST. amend. II.

<sup>10</sup> 410 U.S. 113, 153 (1973).

<sup>11</sup> See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1560 (2004). The term “substantive due process” was first used in a Supreme Court opinion in 1948, but the principle was applied by the Court as early as 1857, in *Dred Scott*. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting); *Scott v. Sandford*, 60 U.S. 393, 449-50 (1857). For somewhat different views of the roots of substantive due process, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) and John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

<sup>12</sup> Wilkinson, *supra* note 1, at 265.

<sup>13</sup> *Id.* at 266.

complete ban on abortion in Washington, D.C., holding that the constitutional right does not disappear when the government decides that women are better off without it.

If all this were true, then we would have a close parallel between the right to arms and the right to abortion. Judge Wilkinson implies that there is only a “marginal difference” between this hypothetical and *Roe v. Wade*. We think that is manifestly wrong.

Judge Wilkinson does not take seriously the text of the Constitution or the historical evidence about the meaning of that text. His attitude is most conspicuously displayed in his cavalier dismissal of the very detailed presentation of textual analysis and evidence about the meaning of that text in Justice Scalia’s *Heller* majority opinion. Judge Wilkinson claims that the “upshot of all this argumentation [between Scalia’s majority opinion and Stevens’ dissenting opinion] is that both sides fought into overtime to a draw.”<sup>14</sup> He offers two kinds of evidence.

First, and most prominently, Judge Wilkinson notes that legal journalist Stuart Taylor found both the majority and dissenting opinions persuasive.<sup>15</sup> Mr. Taylor is a very fine journalist, but we cannot imagine why his initial impression of the case, expressed in a 1,400 word newspaper article, should be treated as dispositive. Judge Wilkinson also relies on Professor Mark Tushnet’s recent book about the Second Amendment, which says at one point that “the arguments about the Second Amendment’s meaning are in reasonably close balance.”<sup>16</sup> Professor Tushnet’s analysis is certainly much lengthier than Stuart Taylor’s, but it cannot sustain Judge Wilkinson’s case. Here are three reasons:

First, Professor Tushnet is in fact quite equivocal about the extent to which he thinks the original meaning of the Second Amendment is indeterminate. Consider the following quotations:

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<sup>14</sup> *Id.* at 267. Scalia’s opinion is not without flaws, some of which are noted by Judge Wilkinson. See Wilkinson, *supra* note 1 at 273-74, 284-88, 296-99. For a fuller discussion of *Heller*’s flaws, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009). The alternative offered by Judge Wilkinson, however, is worse than the approach in Scalia’s opinion, not better.

<sup>15</sup> Wilkinson, *supra* note 1, at 266-67 (citing Stuart Taylor Jr., *Torn by the Past: D.C. Gun Case Shows Shortcomings of Originalism*, LEGAL TIMES, July 7, 2008, at 44).

<sup>16</sup> Wilkinson, *supra* note 1, at 271 (quoting MARK V. TUSHNET, *OUT OF RANGE: WHY THE SUPREME COURT CAN’T END THE BATTLE OVER GUNS* at xvi (2007)).

“Looking to an understanding of its terms when it was adopted . . . the pro-gun-rights position is a bit stronger than the alternative.”<sup>17</sup>

“As a matter of original understanding, this [individual-right] interpretation seems unassailable.”<sup>18</sup>

“The history we’ve reviewed, the quotations we’ve gone through, and the early state constitutional provisions we’ve analyzed provide substantial support for *some* individual-rights interpretation, although I have to emphasize that ‘substantial support’ is not ‘a slam-dunk, open-and-shut case.’”<sup>19</sup>

“You can find scattered expressions during the run-up to the Second Amendment’s adoption consistent with this states’ rights interpretation of the Second Amendment, but you have to work pretty hard to elevate them into a position of primary importance.”<sup>20</sup>

“When the Second Amendment was adopted, the collective-rights view, to the extent that anyone held it, was a minor theme in contrast to the stronger citizen-rights one.”<sup>21</sup>

“On balance, originalism supports some version of an individual-rights interpretation, although the case for such an interpretation is closer than proponents of the gun-rights position acknowledge, and the states’ rights interpretation preferred by gun-control advocates isn’t entirely ruled out by originalist interpretation.”<sup>22</sup>

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<sup>17</sup> TUSHNET, *supra* note 16, at xvi.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.* at 49-50.

<sup>21</sup> *Id.* at 67.

<sup>22</sup> *Id.* at 71.

“We’ve seen that, on originalist grounds, the gun-rights interpretation is a bit stronger than the gun-control interpretation.”<sup>23</sup>

Unless “a bit stronger” means the same thing as “unassailable,” these statements are not consistent with one another. In any event, these statements, like Professor Tushnet’s book as a whole, reflect his inability to put together anything like a plausible originalist case for the states’- or collective-right interpretation that Justice Scalia rejected.

Second, Professor Tushnet accuses one of us of “blowing smoke” for saying that the choice between the individual-right and states’-right interpretations of the Second Amendment is “not a hard or close question.”<sup>24</sup> Apart from the fact that he made no effort to refute the numerous and detailed originalist arguments offered in support of the conclusion, Professor Tushnet himself acknowledges that “[a]s a matter of original understanding, this [individual-right] interpretation seems unassailable.”<sup>25</sup> One who argues in favor of what Professor Tushnet himself concedes is an “unassailable” originalist position cannot accurately be accused of just “blowing smoke.”

Third, one of Professor Tushnet’s key textual arguments involves a supposedly technical term in the Second Amendment. “The evidence is overwhelming that ‘keep and bear’ was a technical phrase whose terms traveled together, like ‘cease and desist’ or ‘hue and cry.’ ‘Keep and bear’ referred to weapons in connection with military uses, even when the terms used separately might refer to hunting or other activities.”<sup>26</sup> Professor Tushnet does not provide a single example of this supposedly technical use of the term, let alone “overwhelming” evidence that might support his claim. Nor does he provide any citations that would enable us to locate this “overwhelming” evidence. Justice Stevens drew a similar conclusion in his *Heller* dissent, also on the basis of mere assertion.<sup>27</sup> We suggest that the

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<sup>23</sup> *Id.* at 116.

<sup>24</sup> *Id.* at xv (citing Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 20 (1996)).

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> 128 S. Ct. 2783, 2830 (2008).

reason Professor Tushnet and Justice Stevens cited no evidence is that such evidence does not exist.<sup>28</sup>

Judge Wilkinson also lists a series of specific interpretive questions about which Scalia and Stevens disagreed, and he observes that both Justices cited various sources in support of their respective positions.<sup>29</sup> Judge Wilkinson, however, makes scarcely any effort to show that the arguments and evidence on each side were equally valid or weighty. Any time “both sides cite support” for their positions, it seems, the government should win.<sup>30</sup>

We think that a detailed and disinterested originalist analysis would show that Scalia’s argument that the Second Amendment protects an individual right to have arms for self defense is far stronger than Stevens’ argument for a right restricted to militia service. But this Essay is not the place for such a discussion. Our point here is that Judge Wilkinson provides no such analysis, and thus treats the Constitution as a minor element in constitutional law. What counts for him is a principle of judicial restraint that is dictated by judicial “values.”<sup>31</sup> The bulk of his essay is devoted to arguing that *Roe* and *Heller* were equally guilty of violating those values.

## II. SELECTIVE DEPLOYMENT OF JUDICIAL VALUES

Judge Wilkinson criticizes *Roe v. Wade* on three main “judicial values” grounds: *Roe* generated a lot of litigation that required the courts to resolve “subsidiary technical questions” about the scope of the right the Court created; *Roe* failed to respect legislative judgments; and *Roe* rejected princi-

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<sup>28</sup> It is possible that Professor Tushnet was recalling a similar claim made by Garry Wills. See Garry Wills, *To Keep and Bear Arms*, N.Y. REVIEW OF BOOKS, Sept. 21, 1995, at 62, 67-68. Like Professor Tushnet, however, Wills provided no evidence to support his assertion. For more on Wills, see David B. Kopel, *Faith of Our Fathers: What the Second Amendment Means*, Nat’l Rev. Online, Mar. 16, 2001, available at <http://www.nationalreview.com/kopel/kopel031601.shtml>; Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 27 n.61 (1996). (This happens to be the same article that Professor Tushnet accuses of “blowing smoke”; we wonder whether he read it before he dismissed it. TUSHNET, *supra* note 16, at xv.)

<sup>29</sup> Wilkinson, *supra* note 1, at 267-71.

<sup>30</sup> *Id.* at 268, 272.

<sup>31</sup> For example: “Although judicial review requires some such interference [with the political process], it is justified *only* when a legislature threatens a fundamental right or when the political process is broken.” Wilkinson, *supra* note 1, at 293 (emphasis added). As we shall see, Judge Wilkinson decides which rights are “fundamental” without reference to the Constitution, just as he decides when the political process is “broken” without reference to the Constitution.

ples of federalism.<sup>32</sup> We agree that *Roe* did all of these things. But that is not why *Roe* was wrong. *Roe* was wrong because it had no basis in the Constitution and was not derived from precedent.<sup>33</sup> If there were a right to abortion in the Constitution, it would be the duty of courts to decide whatever “subsidiary technical questions” might arise. It would also be the courts’ duty to overturn democratically enacted legislation that violated the Constitution. And it would be the courts’ duty to apply principles of federalism in a manner consistent with the constitutional provision that protected a right to abortion.

It is true that the Court’s abortion decisions have been politically controversial. And it is true that Justice Scalia and other Justices have criticized *Roe* and its progeny for making decisions that properly belong to the state legislatures. But the premise of the criticism is that *Roe* invented a right that is *not in the Constitution*. Neither Justice Scalia nor any other Supreme Court Justice has ever said that their criticisms of *Roe* would be valid if the right to abortion *were* in the Constitution.

*Heller* is fundamentally different. The right of the people to keep and bear arms, unlike the right to abortion, *is actually in the Constitution*. It is therefore the duty of the courts to protect that right. Even if doing so generates litigation on secondary issues, some of them technical. Even if doing so requires legislative acts to be overturned. And (hypothesizing Fourteenth Amendment incorporation) even if doing so requires impinging on what would otherwise be considered state prerogatives.

Judge Wilkinson disagrees, on the ground that courts should enforce only those rights that are *unambiguously* enumerated,<sup>34</sup> which means that they must be “*incontrovertible*.”<sup>35</sup> Thus, if *even the slightest doubt* can be raised about the meaning of a constitutional provision, it must be interpreted as narrowly as possible, so as to leave legislatures empowered to do whatever they think best.

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<sup>32</sup> Wilkinson, *supra* note 1, at 276, 289, 304.

<sup>33</sup> The *Roe* Court cited a variety of cases dealing with “privacy,” but did not argue that they implied a right to abortion. *Roe* simply said that “we feel” the right of privacy is broad enough to include a right to abortion. 410 U.S. 113, 153 (1973).

<sup>34</sup> See, e.g., Wilkinson, *supra* note 1, at 255, 257, 258.

<sup>35</sup> *Id.* at 267 (emphasis added).



This is a radical approach to constitutional interpretation. If Judge Wilkinson consistently applied what he calls his “neutral principles” of judicial restraint in the way that he applies them to *Heller*, almost every exercise of judicial review in our history would stand condemned. Perhaps there are people who actually believe such a thing, but Judge Wilkinson himself does not, as his own essay proves.

Take, for example, Judge Wilkinson’s express and emphatic endorsement of *Brown v. Board of Education*, which held that racial segregation in public schools violates the Equal Protection Clause.<sup>36</sup> On every single criterion that he invokes in his attack on *Heller*, *Brown* was a far more “activist” decision. Because we are going to compare *Brown* with *Heller* in some detail, we stress that Judge Wilkinson has invited this comparison by saying that *Brown* “heroically rejected judgments by the elected branches of government.”<sup>37</sup>

#### A. *The Text*

First, the text of the Equal Protection Clause<sup>38</sup> is much more ambiguous than the Second Amendment—as should be obvious to anyone who has even a passing familiarity with the Court’s constantly evolving equal protection case law. In fact, we doubt that any equal protection case has ever been resolved solely on the basis of the constitutional text. Certainly not *Brown v. Board of Education*, which did not discuss the constitutional text, and which characterized the legislative history of the provision as at best “inconclusive.”<sup>39</sup>

On Judge Wilkinson’s principles, *Brown*’s approach to the constitutional text was incomparably more “activist” than *Heller*’s.

#### B. *Historical Evidence*

Judge Wilkinson denies that the Second Amendment protects the right to keep a handgun for self defense.<sup>40</sup> But he cannot deny that Americans already had this right when the Constitution and Bill of Rights were adopted, and that Americans had been exercising the right ever since they

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<sup>36</sup> *Id.* at 254 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>37</sup> Wilkinson, *supra* note 1, at 254.

<sup>38</sup> “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>39</sup> 347 U.S. at 489-90.

<sup>40</sup> Wilkinson, *supra* note 1, at 272 (“Justice Stevens and his fellow dissenters should have prevailed . . .”).

arrived on these shores. Federal gun control laws were nonexistent when the Bill of Rights was adopted, and nothing like the one at issue in *Heller* was enacted under federal law until 1976, when the D.C. City Council adopted the very statute that *Heller* found unconstitutional.<sup>41</sup>

How does this compare with the right to have the schools desegregated? Racial segregation was quite common throughout the nation when the Fourteenth Amendment was adopted, and the *Brown* Court did not even suggest that the legislative history evinced an expectation that the Equal Protection Clause would render segregated schools unconstitutional.

Once again, *Brown* fares far worse than *Heller* on Judge Wilkinson's "activism" criterion.

### C. "Novel" Rights

Judge Wilkinson claims that *Heller* "announce[d] a novel substantive constitutional right" or "create[d] a new blockbuster constitutional right."<sup>42</sup> What makes this a "novel" right? Apparently the fact that the Court waited two hundred years to "acknowledge" it.<sup>43</sup> But there are many cases over the last two centuries in which the Court has acknowledged, at least in dicta, that the Second Amendment protects an individual right to arms.<sup>44</sup>

It is true that *Heller* was the first case in which the Supreme Court declared that a law violated the Second Amendment. But maybe that had something to do with a paucity of congressional violations of the Second Amendment. Do constitutional rights become "novel" because Congress waits a long time to violate them? Furthermore, under Judge Wilkinson's theory, the Court must certainly have been creating "novel" constitutional rights when it finally departed, well into the twentieth century, from its longstanding refusal to find any violations of the manifestly ambiguous Free Speech and Free Exercise of Religion Clauses.<sup>45</sup>

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<sup>41</sup> A Georgia ban on most handguns was declared unconstitutional because it violated the Second Amendment. *Nunn v. Georgia*, 1 Ga. 243 (1846). This decision was apparently based on the principle that state courts could enforce Bill of Rights provisions against the state governments, even though *Barron v. Baltimore* prevented the federal courts from doing so. See Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1 (2007).

<sup>42</sup> Wilkinson, *supra* note 1, at 267, 279.

<sup>43</sup> *Id.* at 265.

<sup>44</sup> See David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

<sup>45</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a discretionary state licensing scheme for religious proselytizers); *Stromberg v. California*, 283 U.S. 359 (1931) (invalidating a state

Even if one could take Judge Wilkinson's novelty objection seriously, *Heller* is much less vulnerable to that objection than *Brown*. The Supreme Court waited until 1954 to find that segregated schools were unconstitutional, notwithstanding the fact that they had been commonplace for nearly a century after the adoption of the Fourteenth Amendment. In contrast, the Court took only thirty-two years to get around to the handgun ban, which was a type of restriction that has never been commonplace in America.

Judge Wilkinson also contends that prior Supreme Court precedent at least arguably foreclosed the result in *Heller*.<sup>46</sup> We disagree, but even if he were right, *Brown* fares much worse on this criterion. The Court's 1896 decision in *Plessy v. Ferguson*<sup>47</sup> foreclosed the result in *Brown* much more clearly than any Second Amendment precedent could possibly be thought to have foreclosed the result in *Heller*.<sup>48</sup>

#### D. "Political Thickets"

Judge Wilkinson predicts that *Heller* will drag the Court into "political thickets."<sup>49</sup> That may or may not happen. But one thing we know for sure is that *Brown* caused enormous political upheavals, and triggered an explosion of litigation that continues to this day.

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statute that forbade the exhibition of a red flag as a symbol of opposition to the government). The first free speech case analogous to *Heller* insofar as it struck down a *federal* statute did not come until 1965. See William Van Alstyne, *Corliss Lamont and the Postmaster General: A Synecdoche for the First Amendment in the Era of the Warren Court (1953-1969)*, in EARL WARREN AND THE WARREN COURT 113 (Harry N. Scheiber, ed., 2007) (discussing *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)).

<sup>46</sup> Wilkinson, *supra* note 1, at 271.

<sup>47</sup> 163 U.S. 537 (1896).

<sup>48</sup> Judge Wilkinson writes: "With respect to precedent, Justice Scalia distinguished the cases—notably *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller*—appearing to view the Second Amendment right as a collective one, while Justice Stevens contended that they foreclosed the Court's interpretation." Wilkinson, *supra* note 1, at 271 (citations omitted). We have no idea why Judge Wilkinson would think that *Cruikshank* and *Presser* endorsed the collective-right theory. *Cruikshank* simply held that the Second Amendment (like the First Amendment right of assembly), was a right against state action, not a right against private interference with arms or assembly. *Presser* upheld an Illinois ban on armed parades on the ground that the Second Amendment is not directly enforceable against the states. Contrary to Judge Wilkinson's mistaken claim, moreover, Justice Stevens did not say that *Cruikshank* or *Presser* foreclosed *Heller*'s interpretation of the Second Amendment. Nor did *Miller* adopt the collective-right theory. See Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009).

<sup>49</sup> Wilkinson, *supra* note 1, at 279-88.

The *Brown* decision itself came only after it was argued twice in the Supreme Court.<sup>50</sup> The Court had to issue another opinion in the case the following year, and yet another decision in the very same case several *decades* later.<sup>51</sup> Controversies over judicial orders relating to school busing consumed the nation for many years after the Court issued the initial *Brown* decision in 1954. More than half a century later, the Court is bitterly and narrowly divided over the meaning of that decision and over the application of the Equal Protection Clause to race-conscious school assignment laws.<sup>52</sup>

There is no reason to expect comparable results from *Heller*. *Heller* (unlike *Brown*) was broadly supported by the public, and was quite consistent with current and historical practice. At the time of *Brown*, many states had segregation laws. At the time of *Heller*, only two large cities (D.C. and Chicago) and five Chicago suburbs had handgun bans, and D.C. was unique in banning the possession of any operable firearm for self-defense in the home. Even before *Heller*, a February 2008 Gallup poll found that 73 percent of Americans believed that the Second Amendment guarantees all law-abiding citizens (not just militia) a right to arms.<sup>53</sup> *Brown* had similarly high support among northern whites (70 percent), but only 8 to 15 percent support among southern whites; in the American public as a whole, opinion was divided, with 55 percent agreeing with *Brown* and 40 percent disagreeing.<sup>54</sup>

Whatever else *Brown* may be, it is not a case that represents a judicial aversion to entering “political thickets.”

#### *E. More Work for the Courts*

Judge Wilkinson argues at length that *Heller* will ensnare the courts in “subsidiary issues” about the scope of the right to arms.<sup>55</sup> Nobody yet knows how Second Amendment jurisprudence will develop in the after-

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<sup>50</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

<sup>51</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Bd. of Educ. v. Brown*, 503 U.S. 978 (1992).

<sup>52</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch., Dist. No. 1*, 551 U.S. 701 (2007).

<sup>53</sup> Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns: Nearly Three in Four Say Second Amendment Guarantees this Right*, Gallup Poll, March 27, 2008, <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx>.

<sup>54</sup> Michael J. Klarman, *FROM JIM CROW TO CIVIL RIGHTS AND THE STRUGGLE FOR EQUALITY* 366-67 (Oxford University Press 2004); Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, Gallup Poll, May 14, 2004, <http://www.gallup.com/poll/11686/Race-Education-Years-After-Brown-Board-Education.aspx> (results from May 1954).

<sup>55</sup> Wilkinson, *supra* note 1, at 280-88.

math of *Heller*, but it will certainly take some doing before it becomes even remotely as complex as the Court's equal protection case law on racial discrimination.<sup>56</sup> Can Judge Wilkinson truly believe that the courts should refuse to enforce the Constitution whenever doing so may generate many cases, or difficult cases, some of which may involve "subsidiary issues"?

Equal protection case law is chock full of such issues, as was *Brown* itself.<sup>57</sup> And equal protection is hardly an anomaly. One need, for instance, only read the Fourth Amendment's prohibition on "unreasonable searches and seizures" to know that it was likely to generate a multitude of difficult and contestable issues, as it certainly has. Should that provision of the Bill of Rights have been interpreted to prohibit only those searches and seizures that are "unambiguously" or "incontrovertibly" covered by the highly ambiguous constitutional language? Judge Wilkinson's approach would make the Fourth Amendment mean as little as he thinks the Second Amendment should mean.

But perhaps Judge Wilkinson really does wish the Fourth Amendment were unenforceable. At one point he says: "[I]t is patently wrong to have an issue that will not only affect people's lives, but could literally *cost* them their lives, decided by courts that are not accountable to them."<sup>58</sup> Who knows how many lives have been lost because of Fourth Amendment restrictions that prevent the police from apprehending dangerous criminals? Are all the decisions that could have this effect really "patently wrong"?

In any event, Judge Wilkinson misunderstands the nature of the subsidiary questions that are apt to arise under the Second Amendment. Consider, for example, his discussion of a pending case in which certain aspects of the new D.C. gun licensing system are being challenged. Judge Wilkinson

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<sup>56</sup> So far, at least, the lower courts have had little difficulty in dealing with cases raising Second Amendment issues. See Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water (mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HAST. L.J. 1245 (2009).

<sup>57</sup> Consider, to take just one example, the elaborate efforts of the district court in the original Topeka case to determine whether the school district had complied with the Court's *Brown* decision after more than thirty years of litigation. *Brown v. Bd. of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987). That decision was reversed by the Tenth Circuit in a similarly elaborate opinion. *Brown v. Bd. of Educ.*, 892 F.2d 851 (1989). After all this, these courts were told to go back and try again, in light of new equal protection decisions by the Supreme Court. *Bd. of Educ. v. Brown*, 503 U.S. 978 (1992).

<sup>58</sup> Wilkinson, *supra* note 1, at 302.

points to that case as an example of the supposedly difficult “technical questions” that courts will have to resolve:

The plaintiffs argued that [D.C.’s] gun registration requirements were onerous and the imposition of a fee for ballistic identification testing was unconstitutional. They pointed to the requirements that gun owners take a written test, pass a vision test, have their fingerprints taken, undergo a background check, and pay a fee, that pistols be submitted for ballistics identification tests, and the potential delay these requirements would cause in issuing registrations. The court was asked to decide whether each of these requirements infringed on the right to bear arms for self-defense, even though they did not approach the complete ban at issue in *Heller*. All this sounds dangerously like the subsidiary issues considered in [the *Casey* abortion case] under the “undue burden” test.<sup>59</sup>

On the contrary, what it really sounds like is the well-developed jurisprudence under the Free Speech Clause, where the courts allow governments to regulate speech in order to serve legitimate public purposes, but not to impose onerous regulatory obstacles designed to inhibit the exercise of constitutional rights. That is the right analogy because the right to freedom of speech—like the right to keep and bear arms and *unlike* the right to abortion—is actually in the Constitution. The courts have probably not decided all free speech cases correctly, and they probably will not decide all Second Amendment cases correctly either.<sup>60</sup> But the fallibility of judges who are confronted with difficult issues can hardly justify an interpretive approach that amounts to saying, “The courts should decide only easy constitutional cases.” Whatever kind of theory that is, it is not the theory of *Brown v. Board of Education*.

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<sup>59</sup> *Id.* at 285-86 (citations omitted) (discussing *Heller v. District of Columbia (Heller II)*, No. 08-1289 (D.D.C. filed July 28, 2008)). The *Heller II* complaint is available at [http://stephenhalbrook.com/lawsuits/Complaint\\_Heller-DC.Amended.pdf](http://stephenhalbrook.com/lawsuits/Complaint_Heller-DC.Amended.pdf).

<sup>60</sup> For discussions of the applicability of First Amendment doctrines to the Second Amendment, see, e.g., Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 67-75 (1996); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997); Gary E. Barnett, Note, *Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL’Y 607 (2008).

### F. Federalism

Strangely, Judge Wilkinson criticizes *Heller* at length for violating principles of federalism.<sup>61</sup> *Heller* struck down a federal law, not a state law. Judge Wilkinson claims that the Court has already decided to “incorporate” the Second Amendment through the Fourteenth Amendment,<sup>62</sup> but his evidence consists primarily of a footnote in which the Court expressly *reserved* that issue.<sup>63</sup> We think it is likely that the Court will eventually incorporate the Second Amendment, because the legal arguments under the Court’s precedents overwhelmingly favor that result.<sup>64</sup> But it is irresponsible to criticize the Court for its decision on an issue that it expressly *refrained* from deciding.

Incorporation will be bad, writes Judge Wilkinson, because “gun regulations are so tied to regional preferences and local concerns. Constitutionalizing the issue of firearms regulation will erode the diversity that geography and demography would otherwise produce.”<sup>65</sup> It is not clear that incorporation of the Second Amendment would significantly reduce regional diversity, rather than simply check a few aberrant legislative excesses.<sup>66</sup>

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<sup>61</sup> Wilkinson, *supra* note 1, at 311-22.

<sup>62</sup> *See, e.g., id.* at 311 (criticizing “*Heller*’s renunciation of federalist principles”), 312 (*Heller* Court would not have recognized a robust right “if it did not plan to incorporate that right against the states.”).

<sup>63</sup> *Id.* at 312 (citing *Heller*, 128 S. Ct. at 2813 n.23).

<sup>64</sup> *See* Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 194-96 (2008).

<sup>65</sup> Wilkinson, *supra* note 1, at 311-12.

<sup>66</sup> Only seven states do not currently have a functioning right to bear arms in their state constitutions. This includes the six states in which the constitution is silent (California, Iowa, Maryland, Minnesota, New Jersey, New York), plus Massachusetts, where the right was judicially nullified in 1976. *See* Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976) (overruling by implication Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896) (individual right to arms, but mass armed public parades can be banned) and Commonwealth v. Blanding 20 Mass. (3 Pick.) 304, 314 (1825) (“the right to keep fire arms” is like “the liberty of the press,” in that the right is individual and individuals may be punished for misuse of the right)).

Judge Wilkinson also claims that “a number of cities—including Chicago, Cleveland, Columbus, Hartford, New York City, and Omaha—restrict concealed carrying much more strictly than their respective states; some of those cities prohibit concealed carrying altogether, while others bar the practice with limited exceptions.” Wilkinson, *supra* note 1, at 317. Judge Wilkinson was arguably correct with respect to only half of the cities he names: Omaha, New York, and Chicago.

Nebraska is one of the 40 states where licenses to carry a concealed handgun for lawful protection are generally available to adults who pass a safety class and a background check. NEB. REV. STAT. §§ 69-2427 to -2447 (2008). At one time, Omaha nevertheless did not allow licensed carry. OMAHA, NEB. CODE, §§ 20-192, 20-200, 20-206, 20-251, 20-254 (2009). Before Judge Wilkinson’s article was published, however, the Nebraska Attorney General issued a formal opinion that Omaha’s ban was preempted by the state carry licensing statute. Op. Neb. Att’y Gen. 09001 (2009) The 2009 session of the Nebraska legislature enacted explicit preemption legislation, thus making it clear beyond

But even assuming that local preferences will be significantly frustrated by post-*Heller* cases, so what? Fourteenth Amendment incorporation frequently has that effect, yet Judge Wilkinson does not argue that the rest of the Bill of Rights should apply only to the federal government. And what about *Brown v. Board of Education*? If ever a decision overrode “regional preferences and local concerns,” it was that one.

### G. Judicial “Values”

With almost perfect fidelity to Judge Wilkinson’s professed “judicial values”—federalism and deference to local preferences, respect for legislative judgments, reducing the judicial workload, avoidance of political thickets, and narrow interpretation of ambiguous constitutional provisions—the Supreme Court upheld Jim Crow segregation in *Plessy v. Ferguson*. With utter disregard for Judge Wilkinson’s “values,” and with disregard for precedent to boot, the Supreme Court recognized what by Judge Wilkinson’s theory was surely “a new blockbuster constitutional right” in *Brown v. Board of Education*.

What does Judge Wilkinson have to say about these two cases? According to him, *Brown* “heroically” rejected legislative judgments, and *Plessy* “shamefully” refused to do so.<sup>67</sup> So much for Judge Wilkinson’s adherence to neutral principles.

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all doubt that carry rights in Omaha are the same as in the rest of the state. L.B. 430, 101st Leg., 1st Sess. (Neb. 2009).

Carry permits in New York State are issued by county judges on a discretionary basis; the permits are valid statewide, except that carrying in New York City is not allowed without a permit from the City police department. N.Y. Penal Law § 400.00 (2009).

Illinois is one of only two states without a procedure for issuing handgun carry permits, but carry without a permit is allowed in certain circumstances, and just as much so in Chicago as anywhere else in the state. *See, e.g.*, 720 ILL. COMP. STAT. § 5/24 1(a)(4) (2009) (carrying allowed in one’s abode, place of business, or in an automobile if the gun is not accessible). However, Chicago bans new registration of handguns. CHICAGO, ILL., MUN. CODE § 8-20-050 (2008). So as a practical matter, only people who lived in Chicago before the 1982 enactment of the handgun ban can carry in Chicago.

With respect to the other three cities, Judge Wilkinson is wrong. Like Nebraska, Ohio and Connecticut authorize handgun carry permits for most law-abiding adults. CONN. GEN. STAT., §§ 29-28, 36 (2009); OHIO REV. CODE ANN. § 2923.125 (West 2009). Ohio’s statewide preemption laws forbid all local gun control, including extra restrictions on licensed carry. OHIO REV. CODE ANN. §§ 9.68, 2923.126(A) (West 2009); *Ohioans For Concealed Carry v. Clyde*, 896 N.E.2d 967 (Ohio 2008). Hartford places no additional restrictions on licensed carry, but does require that its local chief of police receive a copy of the same handgun purchase form which is sent to the state police. HARTFORD, CONN. CODE, § 21-59, 21-71 to -72 (1977).

<sup>67</sup> Wilkinson, *supra* note 1, at 254.



We could provide countless examples of the absurdities that follow from the principles of judicial restraint that Judge Wilkinson deploys against *Heller*. The First Amendment would provide a particularly rich source, beginning with the Sedition Act of 1798, which John Marshall thought was perfectly constitutional, and for reasons at least as plausible as those that Judge Wilkinson invokes in defense of the D.C. handgun ban.<sup>68</sup> There is scarcely a field of constitutional law in which the Court has not frequently and quite properly struck down statutes that should have been upheld on the criteria that Judge Wilkinson uses to condemn *Heller*.

We need not multiply examples. Judge Wilkinson himself informs us that he does not actually adhere to his supposedly neutral principles. After noting that *Roe v. Wade* failed to point to evidence that the Constitution says or implies anything about abortion, Judge Wilkinson explains:

The Justices should never have attempted to find substantive rights in what was at best an ambiguous constitutional provision. The difference between substantive and procedural due process is an important one in Fourteenth Amendment law. To be sure, the point should not be pushed to extremes, as *salutary* substantive decisions like *Loving v. Virginia*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska* make clear.<sup>69</sup>

Every single decision in this list violated Judge Wilkinson's "judicial values." They are in that respect no different from *Roe v. Wade*, which Judge Wilkinson sharply condemns, or from *Lochner v. New York*, which he implicitly condemns as well.<sup>70</sup> What makes Judge Wilkinson's favored cases different? Only one thing: he believes they were "salutary," which means that he agrees with them on policy grounds. That is the true nature of Judge Wilkinson's opportunistic recourse to "judicial restraint," and it has nothing to do with the Constitution, or with neutral principles.

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<sup>68</sup> See John Marshall, *Report of the Minority on the Virginia Resolutions (1799)*, in 5 THE FOUNDERS' CONSTITUTION 136-39 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>69</sup> Wilkinson, *supra* note 1, at 258-59 (emphasis added) (citations omitted). *Loving v. Virginia*, 388 U.S. 1 (1967), struck down laws in over 20 states against racial intermarriage. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), declared Oregon's law forbidding private schools to be unconstitutional. *Meyer v. Nebraska*, 262 U.S. 390 (1923), struck down the state's law against teaching the German language.

<sup>70</sup> See, e.g., Wilkinson, *supra* note 1, at 255 & n. 7, 323.

## III. CONCLUSION

Near the end of his assault on *Heller*, Judge Wilkinson employs what might be called telepathic originalism:

Under the Court's rigid national rule, moreover, no one will be able to exercise the liberty to live in a city in which handguns are prohibited. Because the Second Amendment is at best ambiguous in establishing a fundamental right to self-defense in the home, I have little doubt that Madison and Hamilton would describe the Court's rule, not the District [of Columbia]'s, as the greater infringement on liberty.<sup>71</sup>

In fact, *Heller* decided nothing at all about local choices outside such federal enclaves as Washington, D.C. But let us assume that the Court will eventually apply the Second Amendment to the states through Fourteenth Amendment incorporation. It is a rather odd notion of liberty that would empower local majorities to deprive law-abiding minorities of the means to defend themselves against violent criminals who pay no attention to parchment barriers against handgun possession.

Perhaps most significantly, Americans also lack the liberty to live in cities that prohibit racial minorities from buying homes. And the liberty to live in cities that prohibit the expression of unpopular opinions in the press. And the liberty to live in cities that fight crime by convicting suspects without a jury trial. Et cetera. One wonders what Judge Wilkinson thinks Madison and Hamilton would have to say about such "infringement[s] on liberty."<sup>72</sup>

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<sup>71</sup> *Id.* at 320-21.

<sup>72</sup> Actually, we know what Madison would have to say about most of these hypotheticals. See JAMES MADISON, MADISON RESOLUTION (JUNE 8 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11, 13 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Buckford eds., 1991) (reprinting Madison's proposal to amend the Constitution to forbid the states to "violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases").

In any case, why is Judge Wilkinson so sure that he knows what Madison and Hamilton would say about *Heller*? He provides no citations. Presumably, he is not thinking of *Federalist No. 46*, where Madison extolled “the advantage of being armed, which the Americans possess over the people of almost every other nation.” Nor of Madison’s endorsement of Tench Coxe’s article describing the proposed Second Amendment as confirming the people’s “right to keep and bear their private arms.”<sup>73</sup>

Judge Wilkinson’s assault on the *Heller* decision amounts to a litany of unsupported accusations that Justice Scalia and those who joined his opinion are guilty of judicial activism, inconsistency, and result-oriented jurisprudence. To Judge Wilkinson’s warning that “we must be ever on our guard, lest we erect our prejudices into legal principles,”<sup>74</sup> we must respond: Physician, heal thyself.<sup>75</sup>

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<sup>73</sup> See David B. Kopel & Stephen Halbrook, *Tench Coxe and the Right to Keep and Bear Arms in the Early Republic*, 7 WM. & MARY BILL RTS. J. 347, 367 (1999); Letter from James Madison to Tench Coxe (June 24, 1789), in 12 THE PAPERS OF JAMES MADISON 257 (Robert A. Rutland et al. eds., 1977) (praising Coxe’s newspaper essay on the proposed Bill of Rights, including a private, general right of arms, and noting that ratification will “be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the cooperation of your [*i.e.* Coxe’s] pen.”).

<sup>74</sup> Wilkinson, *supra* note 1, at 255 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>75</sup> See *Luke* 4:23 (King James Version).